UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MOUNTAIRE FARMS, INC.,

Employer,

and

UNITED FOOD AND COMMERCIAL WORKERS UNION, LOCAL 27,

Case 05-RD-256888

Incumbent Exclusive Representative,

and

OSCAR CRUZ SOSA,

Petitioner.

BRIEF *AMICUS CURIAE* OF SERVICE EMPLOYEES INTERNATIONAL UNION

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IDENTITY AND INTEREST OF AMICUS CURIAE

Amicus Curiae, Service Employees International Union ("SEIU") is a labor union of more than two million people in the United States (including in Puerto Rico) and Canada, and is the largest union of healthcare workers in the United States. More than half of SEIU's two million members work in the healthcare industry, including as doctors, nurses, nursing assistants, technicians, therapists, home care providers, administrative staff, janitorial workers, and food service staff. SEIU is also one of the largest unions of public service employees, with more than one million local and state government workers, public school employees, bus drivers, and child care providers. SEIU also represents workers in the property service industries. Approximately 250,000 SEIU property service workers nationwide clean, maintain, and provide security for commercial office buildings, co-ops, and apartment buildings, as well as public facilities like theaters, stadiums, and airports. SEIU members live and work in the communities addressed in this brief.

SUMMARY OF ARGUMENT

The question posed in the current case is a narrow one regarding whether an allegedly unlawful union-security clause in a collective-bargaining agreement should bar the petition that was filed, as the National Labor Relations Board ("Board" or "NLRB") acknowledges. Accordingly, the Board should focus solely on addressing that narrow question. However, the Board inexplicably chose this case as a vehicle for opening up the possibility of rescinding the contract bar doctrine completely. The invitation for briefs also invited comments on four areas of the contract bar doctrine without any hint of what the Board is contemplating modifying about these areas. The implications of any change to the contract bar doctrine by Board weigh heavily

against any such modification and therefore, the Board should refrain from making any modifications to the doctrine.

Under the well-established contract bar doctrine, a current and valid collective-bargaining agreement will ordinarily serve as a bar to the holding of an election for up to three years from its effective date. The twin goals of the doctrine are to promote industrial peace and stability by ensuring that the labor relations environment is not disrupted for the duration of the collective-bargaining agreement, while simultaneously affording employees a reasonable opportunity to change or eliminate their bargaining representative at predictable intervals. Unions and employers alike have relied on this doctrine for more than eighty years and rightfully so because the doctrine is inherently beneficial to all parties. Accordingly, the Board should refrain from modifying the doctrine at all.

The contract bar doctrine is undeniably essential to labor peace and stability, as it allows the parties to enter into an agreement and provides a chance for the parties' relationship to bear fruit. The labor stability and peace offered by the contract bar doctrine is beneficial to all relevant parties. Workers can be at ease knowing that the terms of their employment for the next three years are memorialized in the collective-bargaining agreement and expect that it will remain unchanged. Unions can predict their budgets and provide effective representation to their workers for the duration of the contract without the looming threat of a rival union seeking to question their standing, and therefore, focus on ensuring the employer's compliance with the agreement. Employers can similarly focus on other aspects of their business knowing that they can predict their labor costs.

This is especially important for employers in the property services and healthcare industries. For example, the financial stability and predictability offered by the contract bar

doctrine allow employers in the property services industry, especially those who enter commercial leases and contractor agreements, to pass down the cost of doing business to other parties. In addition to the parties directly involved in the collective-bargaining agreement, any modification to the contract bar doctrine by the Board could also negatively impact the third parties who, though not parties to the contract, have significant interests in the outcome of the agreements. This is particularly true in the healthcare industry where the importance of labor peace and stability cannot be overstated. The vulnerable and critical communities that SEIU's healthcare members care for cannot afford any uncertainties in labor stability, as any disruption to their care could be disastrous. This reality is clearly evidenced by the current coronavirus pandemic and the crucial role that health care professionals have played in curbing the spread of the novel virus.

The timing of the Board's decision to examine the contract bar doctrine, especially in light of the current pandemic, also poses a threat to labor peace and stability. It is not difficult to see how any modification to the contract bar doctrine by the Board could incentivize employers, notwithstanding the illegality of doing so, to secretly start a decertification campaign before a massive layoff in an attempt to skirt its contractual obligations under a valid collective-bargaining agreement.

ARGUMENT

A. Amicus Curiae SEIU supports the arguments raised by the incumbent union in its pleadings.

Amicus Curiae supports and restates the arguments raised by United Food and Commercial Workers (UFCW) Local 27, in its papers filed before the Board in this matter. Particularly, Amicus Curiae SEIU is of the opinion that the Board's Notice of Invitation to File

Briefs dated July 7, 2020 goes beyond the narrow question raised in this case. In the Board's July 7, 2020 Notice, it expressly admits that the narrow question posed in this case is "whether the petition is barred from being processed at this time by the Board's contract bar doctrine." This alone should be the only question posed here. Therefore, the Board's decision to exploit this case to modify or rescind the doctrine without explanation – at the risk of eroding industrial stability – is unreasonable to say the least, particularly during a pandemic that is already wreaking havoc on the economy.

B. The Board should refrain from making any changes to the contract bar doctrine as it currently exists because there are long and well established practical and policy reasons for the doctrine's existence.

1. The contract bar doctrine has worked as a practical matter for decades without significant criticism.

The contract bar doctrine, which dates back to 1939, has withstood more than eighty years of Board scrutiny. In *National Sugar Refining Co. of New Jersey*, the Board first refused to "proceed with an investigation of representatives" on the basis of a valid collective-bargaining agreement "until such time as the contract is about to expire and a question exists as to the proper representative for collective bargaining with respect to the negotiation of a new agreement." 10 NLRB 1410, 1415 (1939). Since then, the contract bar doctrine has existed as a consistent and fundamental component of federal labor law, regardless of the political party of the President or the Board members, benefiting labor and management alike. In fact, when the Board extended the contract bar period from two years to three years, it did so in response to the appeals from "the overwhelming majority of labor and management representatives," noting the importance of "this substantially unified stand of both labor and management" in reaching its decision. *General Cable Corp.*, 139 NLRB 1123, 1125 (1962).

2. The contract bar doctrine is grounded in the text of the National Labor Relations Act.

While the contract bar originated in case law beginning in 1939, the doctrine was subsequently acknowledged in the statutory language of the National Labor Relations Act ("Act"), 29 U.S.C. §§ 151-169. Specifically, the enactment of Section 8(f) of the Act indicates that Congress recognized and acknowledged the existence of the doctrine. 29 U.S.C. §168. On the eve of Congress's enactment of Section 8(f), the Board in *General Extrusion Co.*, 121 NLRB 1165, 1167 (1958), adopted the rule that a contract would not bar an election if it was executed (1) before any employees were hired or (2) before a substantial increase in personnel. The second proviso of Section 8(f) states that "any agreement which would be invalid, but for clause (1) of this subsection, shall not be a *bar* to a petition filed pursuant to section 9(c) or 9(e)" (emphasis added). Therefore, recognizing the likelihood that the Board could reasonably apply its contract bar doctrine, Congress included the second proviso to Section 8(f). *See John Deklewa & Sons, Inc.*, 282 NLRB 1375, 1393 (1987). The inclusion of this proviso would have been unnecessary if Congress did not recognize the existence of the contract bar doctrine. This combined with Congress's use of the term "bar" indicates that Congress not only recognized the existence of the contract bar doctrine, but also recognized its usefulness.

3. The contract bar doctrine appropriately balances the Act's fundamental objectives.

One of the Act's fundamental goals is "industrial peace and stability, fostered by collective-bargaining agreements providing for the orderly resolution of labor disputes" between employees and employers. *Auciello Iron Works, Inc. v. N.L.R.B.*, 517 U.S. 781, 785 (U.S. 1996) (citations omitted). The contract bar doctrine enables a union to focus on obtaining and fairly enforcing a collective-bargaining agreement without worrying about the immediate threat of decertification, and removes the temptation for the employer to avoid bargaining in good faith to

erode support for the union. *Id.* at 786. By allowing for an uninterrupted period of collective bargaining stability, for up to three (3) years, the contract bar doctrine is instrumental in promoting industrial stability.

SEIU is cognizant of the Act's other, and sometimes competing, goal of providing freedom of choice for employees in selecting their bargaining representatives. The contract bar's limited 3-year period serves that competing goal. Indeed, as the Board itself noted, the contract bar doctrine "is intended to achieve 'a finer balance between the statutory policies of stability in labor relations and the exercise of free choice in the selection or change of bargaining representatives.'" *Id.* at 2, quoting *Appalachian Shale Products Co.*, 121 NLRB 1160, 1161 (1958). The Board acknowledged the importance of employees' right to select or change a representative but concluded that postponement of that right is warranted because labor contracts "eliminate strife which leads to interruption of commence" and are "conducive to industrial peace and stability." *Paragon Products Corp.*, 134 NLRB 662, 663 (1961). Thus, as the Supreme Court acknowledged, the contract bar doctrine is "based not so much on an absolute certainty that the union's majority status will not erode…as on the need to achieve stability in collective-bargaining relationships." *Auciello Iron Works,* 517 U.S. at 785.

In 1962, the Board recognized that the "sole…valid rationale for the Board's conducting an election in disregard of the agreement of the *parties* as to the term thereof" is the competing aim of protecting employee free choice, *Montgomery Ward & Co.*, 137 NLRB 346, 347–48 (1962); the same year, when the Board expanded the contract bar period from two to three years, it did so in part to buttress industrial stability during a time of "economic developments resulting from unemployment, the international setting, and technological changes, which tend to complicate and unsettle labor-management relations." *McLeod v. Local 27, Paper Products &*

Miscellaneous Chauffeurs, Warehousemen & Helpers, IBT [Star Corrugated Box Co.] 212 F. Supp 57, 62 (D.C.N.Y.) (1962). Now, as then, the "relatively slight" imposition of the contract bar doctrine on employee freedom is "fully warranted" to "help stabilize in turn our present American economy." *See General Cable Corp.*, 139 NLRB 1123 (1962); *See also* 63 Colum. L. Rev. 569, 575 ("Such [longer] contracts generally have been considered desirable as a means of stabilizing industrial relations— the prime goal of our national labor relations policy").

These policy rationales for maintaining and strengthening the contract bar have been regularly recognized in the cases since the 1939 formulation of the doctrine. *See e.g., Paragon Products Corp.*, 134 NLRB 662, 663 (1961) (setting "forth certain basic principles upon which the entire contract-bar doctrine is predicated and which [are] well settled…: the dual and sometimes conflicting objectives of fostering stability in labor relations and of according to employees an opportunity to express in a Board-conducted election the[ir] freedom of choice," and explaining that contracts "tend to eliminate strife which leads to interruptions of commerce, [and] are conducive to industrial peace and stability [such that once a] contract has been executed by an employer and a labor organization…postponement of the right to select a representative is warranted for a reasonable period of time."); *Union Fish Co.*, 156 NLRB 187, 191–92 (1965) ("Two objects of the Board's contract bar policies are to afford parties to collective-bargaining agreements an opportunity to achieve, for a reasonable period, industrial stability free from petitions seeking to change the bargaining relationship, and to provide employees the opportunity to select bargaining representatives at *reasonable and predictable* intervals.") (emphasis added); *Direct Press Modern Litho, Inc.*, 328 NLRB 860, 860-61 (1999) (explaining that the contract bar "permit[s] the employer, the employees' chosen collective-bargaining representative, and the employees a reasonable, uninterrupted period of collective-

bargaining stability, while also permitting the employees, at reasonable times, to change their bargaining representative, if that is their desire."); *East Mfg. Corp.*, 242 NLRB 5, 6 (1979) ("contract-bar doctrine is intended to promote industrial stability between contractual partners…[which] is no less a concern for management than it is for labor organizations. Each party has substantial investments in the bargaining process and their investments deserve, where practicable, both deference and protection.") These principles are so fundamental, and so obvious, as not to have required much further elaboration in the case law.

4. Current law provides clear, fitting answers to the four questions posed by the Board.

First, SEIU objects to the manner in which the Board requested comments on four areas of the contract bar doctrine absent any information regarding how the Board is considering modifying these areas. This approach placed interested amici in the position of guessing what the Board might be contemplating. Whatever the Board may be considering changing, the four areas of contract bar doctrine specified in the invitation need no modification.

i. Current Board law lays out the formal requirements for according bar quality to a contract.

The Board should refrain from modifying the contract bar doctrine, as the formal requirements for according bar quality already serve as safeguards for applying the doctrine. The Board's basic substantive and formal requirements for according bar quality to a contract are outlined in the seminal case of *Appalachian Shale Products Co.*, 121 NLRB 1160 (1958). There, in response to a dispute involving a petition filed prior to the signing and execution of a contract, the Board adopted the general rule that:

> a contract to constitute a bar must be signed by all the parties before a petition is filed and that unless a contract signed by all the parties precedes a petition, it will not bar a petition even though the

> parties consider it properly concluded and put into effect some or all of its provisions."

Id. at 1162. Recognizing that on occasion, the issue of prior ratification may arise and require the litigation of factual issues, the Board clarified and restated the rule that "only where the written contract itself makes ratification a condition precedent to contractual validity shall the contract be no bar until ratified." *Id.* Furthermore,

> [w]here ratification is a condition precedent to contractural [sic] validity by express contractural [sic] provision, the contract will be ineffectual as a bar unless it is ratified prior to the filing of a petition, but if the contract itself contains no express provision for prior ratification, prior ratification will not be required as a condition precedent for the contract to constitute a bar.

Id. at 1163. In the same case, the Board also addressed and affirmed the general rule that to bar a petition, a collective-bargaining agreement must contain substantial terms and conditions of employment. *Id*. However, it reconsidered and eliminated the exception that an agreement limited to wages and containing no other terms and conditions could be upheld as a bar. *Id.* The Board reasoned that such an exception was inconsistent with the Act's intended objective of providing stability in bargaining relationships, as absent the requirement that a contract contain substantial terms and conditions of employment, the parties will remain in a "continuous state of uncertainty with respect to material and pertinent aspects of their labor relations during the lifetime of the agreement." *Id*. Consequently, the Board restated the rule that "to serve as a bar, a contract must contain substantial terms and conditions of employment deemed sufficient to stabilize the bargaining relationship; it will not constitute a bar if it is limited to wages only, or to one or several provisions not deemed substantial." *Appalachian Shale Prods. Co.*, 121 NLRB 1163-64.

The Board concluded by acknowledging that there are several other areas dealing with the adequacy of a contract for contract bar purposes, but that they do not require revising. *Id.* at 1164 Among them is the rule that a contract for members only does not operates as a bar. *Id.* Instead to serve as a bar, a contract must clearly, by its terms, encompass the employees sought in the petition. *Id.* Finally, the Board stated that a contract asserted as a bar, must embrace an appropriate unit. *Id.*

In light of the Board's holdings in *Appalachian Shale Prods. Co.*, it is clear that a contract is not accorded bar quality merely for being in place. Rather, in order for a contract to be accorded bar quality, such an agreement must satisfy certain formal and substantive requirements. *Seton Med. Ctr.,* 317 NLRB 87 (1995*); see also De Paul Adult Care Cmty, Inc.,* 325 NLRB 681 (1998). The agreement must: 1) be reduced to writing; 2) signed by the parties prior to the filing of the petition that it would bar; 3) contain substantial terms and conditions of employment sufficient to stabilize the parties bargaining relationship; 4) clearly encompass the employees involved in the petition; and 5) cover an appropriate bargaining unit. *See Appalachian Shale Products Co.*, above; *Empresas Stewart Cementerios d/b/a Cementerio Los Cipreses*, 12-RC-254044 at 10 (2020); *see also De Paul Adult Care Cmty, Inc.,* 325 NLRB 681, 681 (1998). The contract need not be embodied in a formal document. *Seton Med. Ctr.,*317 NLRB 87, 87 (1995). It will be sufficient if the agreement is contained in an informal document or a series of documents, such as a written proposal or written acceptance, provided such informal document contains substantial terms and conditions of employment, and is signed. *Id*. In light of these well-established requirements, there is no need for the Board to modify the doctrine as it exists.

ii. The circumstances in which an allegedly unlawful contract clause will prevent a contract from barring an election are clear from current Board law.

Prior to the Board's decision *Paragon Prods. Corp.*, 134 NLRB 662 (1961), there existed a presumption of illegality with respect to any contract containing a union security clause which did not expressly reflect the precise language of the statute. *See Keystone Coat, Apron & Towel Supply Company*, 121 NLRB 880 (1958). In *Keystone*, the Board had stated that a contract would not qualify as a bar if its union-security did not expressly reflect the limitations placed on such clauses by Section 8(a)(3) of the Act. However, in *Paragon Products Corp*. the Board overruled *Keystone*, and reformulated its position as:

> only those contracts containing a union-security provision which is clearly unlawful on its face, or which has been found to be unlawful in an unfair labor practice proceeding, may not bar a representation petition. A clearly unlawful union-security provision for this purpose is one which by its express terms clearly and unequivocally goes beyond the limited form of union-security permitted by Section 8(a) (3) of the Act, and is therefore incapable of a lawful interpretation

Paragon Prod. Corp., 134 NLRB 662, 666 (1961). The Board expressly listed those unlawful provisions as including:

> (1) those which expressly and unambiguously require the employer to give preference to union members (a) in hiring, (b) in laying off, or (c) for purpose of seniority; (2) those which specifically withhold from incumbent nonmembers and/or new employees the statutory 30-day grace period; and (3) those which expressly require as a condition of continued employment the payment of sums of money other than "periodic dues and initiation fees uniformly required."

Paragon Prod. Corp., 134 NLRB at 666; *see Peabody Coal Co.*, 197 NLRB 1231 (1972) (holding that a contract clause mandating that operators were under a positive duty to give

preference in hiring to members of the intervenor union was unlawful and incapable of a lawful interpretation, and therefore the contract was no bar to a petition); *Royal Components, Inc.,* 317 NLRB 971(1995) (explaining that an employer violates Section 8(a)(3) when it maintains a union-security clause that allows a 7-day grace period, instead of the 30-day period required by statute, regardless of whether such a clause has or was intended to be enforced)*; Ace Car & Limousine Serv.,* 357 NLRB 359 (2011) (holding that a union-security clause requiring the payment if "assessments" as well as dues was unlawful because "assessments" do not fall within the meaning of "periodic dues" as used in Section 8(a)(3) of the Act).

Furthermore, the Board clarified that the "mere existence of a clearly unlawful union-security provision in a contract will render it no bar" regardless of whether it has or was intended to be enforced. *Id.* at 667. However, such a defect could be cured by 1) the inclusion of a provision that clearly defers the effectiveness of the unlawful clause, or 2) the elimination of such clause by a properly executed rescission or amendment. *Id.; see also NLRB v. Martin Bldg. Material Co.,* 431 F.2d 1246, 1248 (5th Cir.1970) ("[t]o be effective in nullifying questionable clauses in the contract the savings clause must specifically defer application of the questionable clause until it is determined to be legal" (quoting NLRB v. Broderick Wood Products Co., 261 F.2d 548, 557 (10th Cir. 1958)); *Royal Components, Inc.,* 317 NLRB 971(1995) (where the Board held that although the union-security clause that allowed a 7-day grace period instead of the 30-day period required by statute was unlawful, the inclusion of a savings clause preserved the remaining portions of the contract).

iii. Current Board law makes clear the duration of the bar period during which no question of representation can be raised (including the operation of the current "window" and "insulated" periods), with well-founded policy reasons supporting current law.

The contract-bar is one of the few parts of the NLRB that has been relatively unchanged through the near century of administrative law and Board decisions. The rule has been clear and unequivocal. A contract operates as a bar from its effective date to the third anniversary, regardless of whether the contract is longer than three years. This period acts as a needed barrier in the bargaining process. It prevents frequent changes to the relationship between the bargaining representative, the Union, and the workers. It maintains the relationship between the parties while allowing the relationship time to grow and develop. The Board has found that the relationship between the parties must be given a chance to bear fruit. The contract-bar gives the contract time, and by so doing it fosters industrial stability. This industrial stability is balanced against the Sec. 7 rights of the worker by the Board implementing the contract-bar. To remove or shorten the contract-bar severely hampers that relationship and threatens to disrupt the promise of labor peace.

Labor peace is important for all parties. It provides the employer and union an ability to forecast their budgets for several years and pass costs of business down to other parties, such as commercial leases or contractor agreements. If the bar is eliminated it would lead to a frustration of that peace. Employers and unions would always face the problem that any contract settlement could be upset if a rival union made a claim that it could do better. It would lead to a unilateral position where workers could opt out of the contract but the employer would not have a similar opportunity.

Just as important as the contract-bar are the window and insulation periods, which act as a buffer between union petitions and the bargaining process. It allows unions and employers that have expiring contracts to prepare for bargaining, while also allowing a window of opportunity for workers to exercise their rights as a union. In our experience, the timing of the window and insulated periods has worked well. While workers and rival unions have a clearly defined and adequate period in which to seek an election, the parties have what is usually an adequate amount of time to complete negotiations.

The contract-bar provisions adopted by the NLRB ensure that members of a union are insulated by the protections of Sec. 7 of the NLRA, while also balancing those essential protections with industrial stability between employers and the unions. It reinforces the need for industrial stability and worker's rights to be in harmonious coexistence. To remove the contract-bar would frustrate both the reason the bar was implemented and the aim of the NLRA when passed by Congress. The contract-bar length has rarely been contested in a Board Hearing, nor has it been seriously challenged in the judiciary or legislature. This is one of the few parts of the NLRB's decision making that has been seen as static through the life of the Board. The contract-bar provides stability.

More importantly, the contract bar prevents unnecessary litigation and administrative decision making on behalf of the Board. Changing the contract-bar rules arbitrarily does little to accomplish the goals of the Board, and risks unbearable administrative costs in unlimited elections for an agency with limited resources. Changing this stable doctrine would also create an unnecessary gray area. It is incumbent upon the Board to maintain the contract-bar so that the balance between workers' rights and industrial stability is not irreparably harmed.

iv. Board law satisfactorily addresses how changed circumstances during the term of a contract (including changes in the employer's operation, organizational changes within the labor organization, and conduct by and between the parties) may affect its bar quality, and no changes are necessary.

SEIU believes that the long-standing, stable and clear contract bar doctrine concerning mid-term changes does not require modification, particularly not in a case such as the instant matter that does not present a concrete and specific fact pattern involving changes during the contract. The Board established the basic law concerning mid-term modifications and contract bar over 60 years ago in *General Extrusion Co.*, 121 NLRB 1165 (1958). *General Extrusion* established bright line rules and clear standards to emphasize predictability. The Board intended to minimize litigation over contract bar issues, saving the Board and the parties valuable time, effort and money and expediting the representation case procedures. In our experience, it has been quite successful.

General Extrusion established the guidelines for contract bar when a worksite begins operation but is not yet functioning at full capacity.

> [A] contract will bar an election only if at least 30 percent of the complement employed at the time of the hearing had been employed at the time the contract was executed, *and* 50 percent of the job classification in existence at the time of the hearing were in existence at the time the contract was executed."

Id. at 1167.

This standard protects the employees against having their choice of bargaining representative pre-empted by an excessively small fraction of the workforce, while allowing the parties to achieve a contract stabilizing labor relations during what can be a lengthy period of transition to full operation. Allowing only 30 percent of a unit to cause an election after entering a collective-bargaining agreement negotiated by the majority's chosen representative would turn

majority rule on its head and would frustrate workers. SEIU has found this standard clear and easy to apply, while generating minimal litigation. We have applied it both to bar petitions challenging our contracts and to determine whether to challenge others' pre-mature contracts. On the rare occasion when there was litigation over whether a representative complement was employed, the hearing was short and a decision easily reached. Either way, the simple, bright line rule is effective.

General Extrusion found that changes in the size of the bargaining unit or operations do not affect the contract bar. *Id.* However, the contract does not bar a petition when the "merger of two or more operations result[s] in creation of an entirely new operation with major personnel changes . . .." *Id.* This exception is quite limited. When 31 workers performing similar functions were transferred into an existing unit of 26 employees, the contract continued to have bar effect since no "new operation" was created. *Bowman Dairy Co.,* 123 NLRB 707 (1959). Again, our experience is that this durable rule serves its purposes quite well.

A plant shutdown does not affect the contract bar if the shutdown is temporary and the worksite is to reopen, doing the same work with substantially the same employees. A contract will fail to bar elections following resumption of work at a previously shutdown worksite only if the workforce is comprised of new employees. *General Extrusion* at 1167.

> [A] mere relocation of operations accompanied by a transfer of a considerable proportion of the employees to another plant, without an accompanying change in the character of the jobs and the functions of the employees does not remove a contract as a bar. *Id.* at 1167-68.

An amendment or new agreement covering the changed operation will act as a bar if it comports with the pre-mature extension rules. *Id.* at 1168. The assumption of the operations by a good faith purchaser does not permit the contract to act as a bar unless the purchaser agrees to assume

the seller's collective-bargaining agreement. *Id.* Once again, in our experience, the rule has worked quite well.

5. There would be negative industry-specific implications if the Board abandoned or changed the doctrine

SEIU affiliates represent over one million workers in the healthcare industry, including nurses, technicians, nursing attendants, dietary workers, housekeepers, home health aides, social workers, and pharmacists. 1199SEIU, United Healthcare Workers East ("1199") – SEIU's largest affiliate representing more than 400,000 healthcare workers in New York, New Jersey, Massachusetts, Maryland, Florida and the District of Columbia – has collective-bargaining agreements with hospitals, nursing homes, home care agencies, community-based clinics, and pharmacies. 1199 has successfully negotiated agreements with multi-employer associations that set standards and bring stability to the healthcare industry. For example, for decades, 1199 and the League of Voluntary Hospitals and Homes – a multi-employer association representing more than 100 of the largest hospitals and nursing homes in the New York City area – have been parties to successive collective-bargaining agreements covering more 150,000 workers. Similarly, 1199 and the Greater New York Nursing Home Association – a multi-employer association representing nursing homes throughout New York State – have negotiated labor agreements covering tens of thousands of workers. These master agreements benefit the union and their members, but also benefit the signatory employers, other employers in the industry, and the general public that utilizes the healthcare system.

The contract bar doctrine as it exists not only protects unions from the threats of decertification or rival union petitions, it also – and equally importantly – protects employers from the threats of labor turmoil and economic uncertainty. The multi-employer associations with whom 1199 bargains, as well as the many individual employers that sign "me-too" contracts

with 1199 that mirror the terms of the industry contracts, are motivated to reach agreements with the union in order to maintain labor peace and achieve financial predictability. When healthcare employers enter into a collective-bargaining agreement with 1199, they do so expecting certainty of their labor costs during the period of that agreement. Cost certainty is particularly valuable in the healthcare industry given employers' heavy dependence on government reimbursement through Medicare and Medicaid, as well as the challenges associated with the medical insurance industry. Additionally, healthcare employers enter into agreements with 1199 expecting to be free from labor unrest for the life of the contract. The importance of labor peace and stability in the healthcare industry cannot be overstated. Not only is labor peace operationally important to the employers in the running of their "businesses," but these "businesses" – hospitals, nursing homes, health clinics, home care agencies, and other healthcare institutions – provide services that are critical to the physical and mental well-being of our communities. A disruption in the provision of these healthcare services is potentially devastating to the general public. The stability that the contract bar doctrine fosters is an important component to maintaining a well-functioning health-care system.

SEIU affiliates also represent over 200,000 workers in the property services industry. These workers include commercial office cleaners, security officers, and residential building workers. In cities across the country, SEIU affiliates have been able to negotiate master contracts that bring stability to the industry. For instance, in New York City, SEIU Local 32BJ has negotiated master agreements with the Realty Advisory Board on Labor Relations, Inc. ("the RAB") that cover tens of thousands of workers in both the commercial and residential sectors. These agreements have been mutually beneficial to both workers and employers (and to tenants in both commercial and residential buildings) because they have stabilized the workforce, and

encouraged employers to invest in their workers. Working in partnership with the RAB, Local 32BJ has created a joint labor-management training fund that offers career advancement training to workers on a large variety of subjects ranging from English as a second language to "green" building operations (teaching workers how to operate a building in a more efficient and sustainable manner).

When SEIU affiliates (or other unions) negotiate a collective-bargaining agreement with an employer, the primary thing that the union offers the employer is the promise of labor peace. The contract bar doctrine as it currently exists serves this employer interest because employers know that when they enter into a collective-bargaining agreement they have certainty that the wages and benefits they have agreed to will be binding for at least three years. This certainty is especially important in the property services industry because the costs of the labor contract are often passed on to others. For instance, commercial building owners typically enter into leases with their tenants that are at least five years long. It is helpful for these building owners to be able to lock in their labor costs for several years so that they can calculate how to set prices for their tenants. If the contract bar is eliminated, then employers will lose the certainty that comes with entering into a multi-year labor contract. Instead, at any point during the term of an agreement, workers would have the opportunity to seek new representation and demand higher wages and benefits. The result would be an agreement where instead of both sides being bound for the duration of the contract, the employer would be bound, but the workers would not. This one-sided escape clause is not conducive to the parties reaching an agreement.

Local 32BJ's experience in recent years highlights the value that the parties gain from stable long-term agreements. The collective-bargaining agreements that Local 32BJ has entered into do not neatly coincide with business cycles, but since the Union and the industry have a

long-term relationship, the parties understand that an economic downturn during the term of one collective-bargaining agreement can be offset by a recovery during the term of the next agreement. Local 32BJ's position has been to bargain for slow and steady increases in wages and benefit costs, letting employers reap outsized profits during good times in exchange for the employers accepting the risks of the periodic economic downturns. But, without the contract bar in place, workers could disrupt this stability by demanding a bigger share of the pie during good times.

In advocating for the Board to continue to adhere to the contract bar doctrine as it currently exists, SEIU affiliates are acutely aware of the trade-offs inherent in the contract bar. Local 32BJ has often assisted workers in their efforts to decertify sweetheart unions. But, the mere fact that the contract bar has at times prevented workers from joining Local 32BJ is not a basis for discarding the doctrine. When a particular doctrine gets in the way of achieving some immediate goal, it can be tempting to think it should be discarded. For instance, a union might feel that a no-strike agreement should not be enforceable if workers are fired up over an employer's contract violation. But, the existence of an enforceable no-strike agreement is what allows workers to obtain favorable contract terms in the first place. Similarly, with the contract bar doctrine, there may be times when workers think it is in their self-interest to get rid of their collective bargaining representative mid-contract, but they may not realize how much they would lose if they were no longer able to offer employers the assurance that comes with the contract bar. Likewise, employers might think that they would come out ahead if they could encourage workers to decertify unions in mid-contract, but the result of those mid-contract decertification campaigns might just mean more distractions, disruptions, and disharmony at the workplace.

6. Modifying or rescinding the contract bar doctrine during the current pandemic leaves workers particularly vulnerable to employer-motivated decertification petitions.

Many employers are laying off masses of workers or going out of business completely as a result of the coronavirus pandemic. Collective-bargaining agreements normally provide for extra benefits for workers in the event of a layoff or closure, such as severance and extended benefits beyond what is provided by law. Thus, employers could save significant amounts of money if a union was decertified prior to a mass layoff or closure to avoid such contractual obligations. While it is an unfair labor practice for an employer to start a decertification campaign, the incentive to do so secretly before a mass layoff or closing is undeniable. While employers in certain industries like hotels, for example, are struggling to survive, workers who are suddenly out of work in an uncertain economy are also struggling to survive. Now is not the time to overturn well-settled precedent and make it easier to pull the rug out from under the workers who count on receiving the benefits won by their chosen collective-bargaining representatives. If the Board rescinds the contract-bar doctrine, starting a decertification campaign could potentially save employers millions of dollars — and potentially cost workers millions of dollars.

The increase in mass layoffs in 2020 is very significant, as evidenced by looking at the increase in layoff notices employers have issued under the federal Worker Adjustment and Retraining Notification (WARN) Act, 29 U.S.C. §§ 2101-2109. Generally, the WARN Act requires companies with 100 or more employees to notify affected workers 60 days prior to closures and layoffs. While the federal government does not report nationally on the number of WARN notices filed, some states do report these numbers. A comparison of numbers from 2019 to 2020 from California and Washington state demonstrates the dramatic increase in layoffs:

WARN Notices - California		
	2019	2020
April	93	2207
May	102	1064
June	58	646

WARN Notices - Washington State		
	2019	2020
April	2	52
May	3	29
June	6	46

Layoff provisions and effects bargaining obligations provide additional financial security for workers covered by a collective-bargaining agreement compared to workers with no representation. Many workers have paid dues for years and count on having the benefits negotiated in their contracts in the event they are laid off, whether from downsizing or a complete closure. To remove the contract bar at this time, while the COVID-19 pandemic is causing bankruptcies and closings at an unprecedented level, is unfair to workers. Employers and other business stakeholders have a strong incentive to push behind the scenes for decertification petitions in order to avoid the costs of meeting contractual obligations during layoffs and closings. The possibility exists that business interests are pushing this radical position in the current climate in order to save money. SEIU urges the Board to weigh just as heavily the interest of workers who are in a worse position than employers to bear such costs when they are laid off in an unpredictable economy.

CONCLUSION

In closing, the Board should focus on the narrow issue presented in this case rather than opening up for debate the entire contract bar doctrine. However, since the Board has invited comments on the contract bar, SEIU stresses that the rationale for not allowing election petitions

to be filed during the course of a collective-bargaining agreement is as strong today as any time in the past. The doctrine should not be rescinded, nor should it be modified. Current law fully addresses the four specific areas raised in the invitation for briefs.

For stability in labor relations, unions and employers need time for their relationship to develop. Unions are often willing to agree to incremental increases during the course of collective-bargaining agreements because they are confident those agreements will be in place for at least three years. Without the contract bar, unions would be less inclined to agree to gradual increases for fear of rival unions filing petitions with promises to get more, faster. Without the contract bar, there is nothing to prevent a constant changeover of representatives. That scenario of an endless cycle of elections is not sustainable for anyone, including the NLRB.

In addition to promoting stability, the contract bar doctrine secures the fundamental right of employees to change or remove representatives, and similar to political elections, that right is permitted at regular intervals. Reasonable exceptions to the general contract bar rule were fully developed in current Board law. Labor stability and industrial peace are at the heart of the Act, and the contract bar doctrine is the lynchpin in that heart. That lynchpin should not be removed or even touched.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Nicole Berner, hereby certify that the true and correct copy of the foregoing Amicus Brief was e-filed with the NLRB's Executive Secretary and served via e-mail on the following parties or counsel this 7th day of October 2020.

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